

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

WILLIAM GEISSLER,

Plaintiff,

v.

TENNESSEE PEACE OFFICER STANDARDS
AND TRAINING COMMISSION,

Defendant.

Civil Action No. 11-1717-III
Chancellor Ellen Lyle

MOTION FOR TEMPORARY INJUNCTION

Pursuant to Tenn. Code Ann. § 8-44-106(a) and Tennessee Rule of Civil Procedure 65.07, Plaintiff William Geissler ("Geissler") respectfully moves this Court for a temporary injunction enjoining Defendant Tennessee Peace Officer Standards and Training ("POST") Commission from continuing publication and implementation of a four-page document titled "Citizenship Status: A Policy from the Tennessee POST Commission" ("Policy"), which it created, adopted, and promulgated in violation of the Tennessee Open Meetings Act, Tenn. Code Ann. §§ 8-44-101 *et seq.* In support of Plaintiff's Motion for Temporary Injunction, he relies upon the Complaint, the Memorandum filed in support of this Motion, and the exhibits thereto.

Respectfully submitted,



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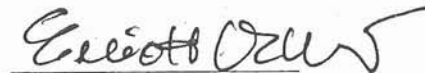
FILED

Certificate of Service

I certify that on this date I served true and accurate copies of this Motion, the Memorandum filed in support, and Exhibits to the Memorandum by hand delivery to:

Office of the Tennessee Attorney General and Reporter
425 Fifth Avenue North
Nashville, Tennessee 37243

Date: 12/19/11


Elliott Ozment, Esq.

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**PLAINTIFF'S MEMORANDUM IN SUPPORT
OF MOTION FOR TEMPORARY INJUNCTION**

INTRODUCTION

Pursuant to Tennessee Code Annotated § 8-44-106(a) and Tennessee Rule of Civil Procedure 65.07, Plaintiff William Geissler ("Geissler"), respectfully moves this Court for a temporary injunction enjoining Defendant Tennessee Peace Officer Standards and Training ("POST") Commission from continued publication and implementation of a four-page document titled "Citizenship Status: A Policy from the Tennessee POST Commission" ("Policy"). As grounds for his Motion, Plaintiff submits that the facts as alleged in his Complaint, which Plaintiff hereby incorporates by reference, and the Exhibits submitted in support thereof, make a threshold showing that Defendant POST Commission created, adopted, and promulgated the 'Policy' in violation of the Tennessee Open Meetings Act ("Act"), Tenn. Code Ann. §§ 8-44-101 *et seq.*

LEGAL STANDARD FOR INJUNCTIVE RELIEF IN OPEN MEETINGS ACT SUITS

Temporary injunctive relief is available where the Plaintiff makes a threshold showing of Open Meetings Act violations. Pursuant to T.C.A. § 8-44-106(a), this Court has "jurisdiction to issue injunctions, impose penalties, and otherwise enforce the purposes of [the statute] upon

application of any citizen of [Tennessee].” The Tennessee Supreme Court has interpreted this statutory language to displace traditional standing requirements. *Fannon v. City of LaFollette*, 329 S.W.3d 418, 429 (Tenn. 2010). Specifically, the Court in *Fannon* held that “a threshold showing of an Open Meetings Act violation is sufficient to confer standing to any citizen.” *Id.* *Fannon* built upon several prior appellate decisions noting the Act’s “remedial nature” and its provision, without limitation, that “any citizen” can bring suit to enforce its provisions through, *inter alia*, “injunctions.” *Id.* (quoting *Metro. Air Research Testing Auth., Inc. v. Metro. Gov’t of Nashville & Davidson Cnty.*, 842 S.W.2d 611, 613 (Tenn. Ct. App. 1992), *Mayhew v. Wilder*, 46 S.W.3d 760, 479 (Tenn. Ct. App. 2001), and *Zveltay v. Metro. Gov’t of Nashville & Davidson Cnty.*, 986 S.W.2d 581, 585 (Tenn. Ct. App. 1998)). Because “any citizen” of Tennessee has standing to seek judicial enforcement for Open Meetings Act violations – including a citizen who faces no individualized harm – “any citizen” may also seek temporary injunctive relief pursuant to the Act. Indeed, *Fannon* involved a case where the Plaintiff sought and received temporary injunctive relief – a result which the Tennessee Supreme Court ultimately upheld. *Fannon*, 329 S.W.3d 421-22.

The Court’s decision in *Fannon* is fully consistent with Rule 65 of the Tennessee Rules of Civil Procedure. *See* Tenn. R. Civ. P. 65.07 (“The provisions of this rule shall be subject to any contrary statutory provisions governing restraining orders or injunctions.”). “Rule 65.07 preserves statutory provisions for injunctive relief which conflict with the rules.” *Schmitt v. Smith*, No. W2000-01726-COA-R3-CV, 2001 Tenn. App. Lexis 866 *22-23 (Tenn. Ct. App. 2001), *rev’d on other grounds by Schmitt v. Smith*, 118 S.W.3d 348 (Tenn. 2003).

In sum, where a Plaintiff can make a threshold showing that the Act has been violated, Courts have the power to enter a temporary injunction.

ARGUMENT

A. Plaintiff Makes A Threshold Showing That The POST Commission Adopted The 'Policy' Through Serial Violations Of The Open Meetings Act.

As set forth fully in Plaintiff's Complaint, the 'Policy' the POST Commission created is the product of serial violations of the Act. The 'Policy' is therefore void and of no effect. Tenn. Code Ann. § 8-44-105. This Court should consequently enjoin its continued publication and implementation.

As a preliminary matter, pursuant to its organic statute, T.C.A. §§ 38-8-101, *et seq.*, the POST Commission is clearly a "governing body" within the meaning of T.C.A. § 8-44-102(b)(1)(A). *See Dorrier v. Dark*, 537 S.W.2d 888, 892, *reh'g denied*, 540 S.W.2d 658 (Tenn. 1976) (construing the statutorily defined term 'governing body' to include "any . . . commission . . . whose origin and authority may be traced to State . . . legislative action."). The "Immigration Committee" the POST Commission empowered to research and draft what ultimately became the 'Policy' is also a 'governing body.' This is because the Committee possessed and exercised the authority "to make decisions for or recommendations to" the POST Commission "on policy or administration," specifically, the POST 'Policy' adopted pursuant to Public Chapter 1112 of 2010. *See* T.C.A. § 8-44-102(b)(1)(A). A functional analysis of the work the Committee performed reveals that it played the principal role in formulating the 'Policy' and recommending it to the Commission in what turned out to be final form. *See Hastings v. South Cent. Human Resources Agency*, 829 S.W.2d 679, 686 (Tenn. Ct. App. 1991) (utilizing a structural and functional analysis to determine whether a Grievance Committee was a 'governing body' subject to the Act). Thus, the activities of both the POST Commission and the Immigration Committee it empowered are subject to the requirements of the Open Meetings Act.

i. Defendant's Chronic Failure To Provide Public Notice Of Its Meetings Violated The Act's Most Fundamental Protections.

The Act makes it the “policy of this state that the formation of public policy and decisions is public business that shall not be conducted in secret.” T.C.A. § 8-44-101(a). Defendant violated T.C.A. §§ 8-44-103(a) and (b) by failing to provide adequate notice of the POST Commission’s October 2010 meeting and the Immigration Committee’s deliberative meetings. Public notice of a meeting is adequate for purposes of the Act when, based on the totality of the circumstances, it would fairly inform the public of the public body’s meeting. *Souder v. Health Partners, Inc.*, 997 S.W.2d 140, 149 (Tenn. Ct. App. 1998) (quoting *Memphis Publ’g Co. v. City of Memphis*, 513 S.W.2d 511, 513 (Tenn. 1974)).

With regard to special meetings such as those the Immigration Committee held, a prior Court set forth a three-pronged test for the notice’s adequacy:

- (1) the notice must be posted in a location where a member of the community could become aware of it;
- (2) the contents of the notice must reasonably describe the purpose of the meeting or the action proposed to be taken; and
- (3) notice must be posted at a time sufficiently in advance of the actual meeting in order to give citizens both an opportunity to become aware of and to attend the meeting.

Englewood Citizens for Alternate B v. Town of Englewood, No. 03A01-9803-CH00098, 1999 Tenn. App. Lexis 406, *6-7 (Tenn. Ct. App. 1999) (construing T.C.A § 8-44-103(b)).

The POST Commission met on October 15, 2010 and approved the ‘Policy’ without any adequate public notice. (See Exhibit A, Excerpt of Minutes of October 2010 POST Commission Meeting; Compl. ¶ 33.a.) Moreover Plaintiff alleges that no public notice – much less ‘adequate’ public notice – was provided for at least one of the Immigration Committee’s special meeting.

(Compl. ¶ 33.b.; Exhibit B, Sign-In Sheet for September 2, 2010 Immigration Committee Meeting.) Accordingly, based on the facts alleged in the Complaint and prior decisions governing adequate public notice for both regular and special meetings under the Open Meetings Act, Plaintiff has made a threshold showing that the POST Commission violated the Act. A temporary injunction is therefore warranted.

ii. The Immigration Committee's E-Mail Deliberations Violated The Act By Circumventing Its Spirit And Requirements.

“A violation of the Open Meetings Act can occur inadvertently if the electronic communication has the effect of circumventing ‘the spirit or requirements’ of the Act.” *Johnston v. Metro. Gov’t of Nashville & Davidson Cnty.*, 320 S.W.3d 299, 312 (Tenn. Ct. App. 2010) (citing T.C.A. § 8-44-102(c)). The appropriate test for a violation is whether such electronic communications constitute ‘deliberation.’ *Id.* Courts interpreting the Open Meetings Act have defined “deliberation” as “weighing arguments for or against a proposed course of action.” *Id.* (citing *Neese v. Paris Special School District*, 813 S.W.2d 432, 435 (Tenn. Ct. App. 1990) and *Black’s Law Dictionary*, 384 (5th ed. 1979)). A more recent “version of Black’s Law Dictionary defines ‘deliberation’ as ‘the act of carefully considering issues and options before making a decision or taking some action.’” *Johnston*, 320 S.W.3d at 312 n. 8 (quoting *Black’s Law Dictionary* (8th ed. 2004)). Any analysis of electronic communications under T.C.A. § 102(c) must also acknowledge the baseline assumption that “strict compliance with the Open Meetings Act is a necessity if the act is to be effective.” *Zselvay*, 986 S.W.2d at 585.

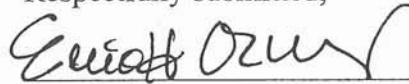
The members of the Immigration Committee communicated via email to draft, present, and give feedback on the ‘Policy.’ (Exhibit C, Emails of the Immigration Committee Regarding the ‘Policy’; Compl. ¶¶ 15, 17 – 23, 25, 30.) Members utilized emails with counsel for the POST Commission to complete the drafting process. They used emails to update each other regarding

presentation to and endorsement of the 'Policy' by the Executive Board of the Tennessee Sheriff's Association. And the Committee communicated by email to inform each other that the 'Policy' was complete and ready for submission in final form to the POST Commission. These are precisely the sorts deliberative acts – drafting, debate, revision, and discussion about the prospects for approval – that could be expected to occur during a meeting or other assemblage of a governing body. Consequently, engaging in such deliberation through electronic communications circumvented the spirit and requirements of the Act and violated Section 8-44-102(c).

CONCLUSION

The violations described above make a threshold showing that the POST Commission violated the Open Meetings Act when it drafted, deliberated, and approved the 'Policy.' Such violations render the 'Policy' void *an initio*. Plaintiff therefore respectfully requests that this Court grant his Motion and issue a temporary injunction enjoining Defendant from continued publication and implementation of the 'Policy' because it is void and of no effect as a result the Open Meetings Act violations Defendant committed when creating it.

Respectfully submitted,



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